(1) 83 - 1840

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN M. BERTHELOT
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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QUESTIONS PRESENTED

1. Was the admission of various items seized by a fireman during a warrantless search of a fire damaged home after the fire had been extinguished, where these items were unrelated to the cause and origin of the fire and were not perceived to be contraband or evidence of any other crime, violative of Petitioner's Fourth Amendment rights?
2. Did a material misrepresentation in the form of an unverifable opinion in the presentence report cause the sentencing procedure to violate Petitioner's rights under the due process clause?
3. Did Petitioner's alleged partial ownership of a house and his occasional presence there constitute sufficient evidence from which to infer a

conspiracy existed between Petitioner and another individual who was present at the house at the time a fire broke out on the premises?

TABLE OF CONTENTS PAGE

TABLE OF AUTHORITIES

CASES	PAGE
Townsend v. Burke 334 U.S. 736 (1940)	35,36
United States v. Bass 535 F.2d 110 (D.C. Cir. 1976)	36,41
United States v. Battaglia 478 F.2d 854 (5th Cir. 1972)	41
United States v. Bland 653 F.2d 989 (5th Cir. 1981)	48
United States v. Brown 584 F.2d 252 (8th Cir. 1978)	54
United States v. Caro 569 F.2d 411 (5th Cir. 1978)	47
United States v. Cloughessy 572 F.2d 190 (9th Cir. 1977)	54
United States v. Cooper 567 F.2d 252 (3rd Cir. 1977)	50
United States v. Fitzharris 633 F.2d 416 (5th Cir. 1980)	54
United States v. Gutierrez 559 F.2d 1278 (5th Cir. 1977)	54
United States v. Henry 661 F.2d 894 (5th Cir. 1981)	54
United States v. Johnson 513 F.2d 819 (2d Cir. 1975)	54
United States v. Kates 508 F.2d 308 (3rd Cir. 1975)	49
United States v. Littrell 574 F.2d 828 (5th Cir. 1978)	54

APPENDIX CONTENTS PAGE

No.

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OCTOBER TERM, 1982

JOHN M. BERTHELOT

V. Petitioner

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, John M. Berthelot,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed his judgment of conviction entered upon a jury verdict of guilty.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The petitioner, John M. Berthelot seeks a writ of certiorari to review the judgment (App.A,pA-1) rendered in accordance with an opinion (App. A,pA-1) of the United States Court of Appeals for the Third Circuit on February 9, 1984. The judgment affirmed a criminal sentence imposed on the petitioner by the District Court for the Western District of Pennsylvania following a jury trial. The Third Circuit Court of Appeals affirmed.

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[1]The other co-defendant below was Francis V. Cherry.

A petition for rehearing en banc was denied by the Third Circuit Court of Appeals (App.C,p 12a) on March 12, 1984.

The Supreme Court has jurisdiction to review the judgment below by a writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND PERTINENT STATUTES INVOLVED

The United States Constitution provides in pertinent part:

Amendment IV - Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V - Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process: Just Compensation for Property

No person shall * * * * be compelled

in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

The following statutes set forth in the Appendix are pertinent:

Title 21 United States Code Section 841.

Title 21 United States Code Section 846.

STATEMENT OF THE CASE

A. Procedural History

On June 22, 1982, Petitioner, John M. Berthelot[1] was indicted along with his co-defendant, Francis V. Cherry by a federal Grand Jury in the Western District of Pennsylvania for violation of 21 U.S.C. §841(a)(1)(Manufacture of a controlled substance) and 21 U.S.C. §846 (Conspiracy to manufacture a controlled substance). On March 1, 1983, a jury trial resulted in a guilty verdict against the Petitioner and Mr. Cherry on the conspiracy charge but both were found not guilty of manufacturing a controlled substance.

On May 11, 1983, Petitioner was sentenced to the maximum period of incarceration

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[1] The indictment incorrectly spelled Appellant Berthelot's surname as Bertholet. The Court of Appeals entered an order correcting the caption. Appendix A, p. A-1

of five (5) years for this offense. Furthermore, under the parole board guidelines, Petitioner was designated in category 6, which represents the highest category for this offense. Consequently, Petitioner will serve at least forty (40) months of his sixty (60) month sentence despite this being his first conviction.

A timely appeal was filed. On February 9, 1984, the Third Circuit Court of Appeals affirmed the judgment of conviction and sentence of imprisonment imposed on the Petitioner in a Memorandum Opinion not for publication, United States v. Berthelot, (3rd Cir. Nos. 83-5354 and 83-5404, February 9, 1984). A timely Petition for Rehearing En Banc was denied.

B. Factual History

The indictment encompasses a four and one-half month period between July 10,

1981, when the conspiracy was alleged to have been formed with Berthelot's purchase of a house on Annin Creek Road, in McKean County, Pennsylvania, and the alleged ending of the conspiracy when that house was destroyed by fire on November 30, 1981.

Count One of the indictment charges Petitioner Berthelot and Mr. Cherry with knowingly, intentionally, and unlawfully conspiring to manufacture methamphetamine contrary to 21 U.S.C. §841(a)(1), (Appendix D , p. A-14) in violation of 21 U.S.C. §846 (Appendix E , p. A-15).

The conspiracy was alleged to have been carried out by Mr. Berthelot acquiring possession of the house on Annin Road in McKean County on July 10, 1981. It was alleged that subsequently, Berthelot and Cherry obtained possession of certain laboratory equipment, and they utilized this equipement for the manufacture of

methamphetamine. It was further alleged that on November 30, 1981, Berthelot and Cherry were engaged in the manufacture of methamphetamine in the house on Annin Road.

Count Two of the indictment alleges that Berthelot and Cherry did knowingly, intentionally, and unlawfully manufacture methamphetamine in violation of 21 U.S.C. §841(a)(1).

The indictment resulted from the events occurring on November 30, 1981, and the investigation which followed. On the morning of November 30, 1981, Officer William Hill of the Pennsylvania State Police responded to a call at the Little Diner in Annin Township, McKean County (R. 126a-127a). When Officer Hill arrived he found Appellant Berthelot sitting at a

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[2] References to "R." are to the Court of Appeals Appendix which Petitioner has requested to be certified for transmission to this Court pursuant to Supreme Court Rule 19.2.

table. Mr. Berthelot's hand was bleeding profusely and his hands and clothes were covered with blood (R.128a). Hill then took Mr. Berthelot to a local hospital where his injuries were treated (R.129a).

While at the hospital Mr. Berthelot said that the injury was the result of a hunting accident. As a result of this statement District Game Protector James Rankin, whose duty includes investigation of all hunting accidents, came to the hospital to investigate the accident. (R.130a-131a). Mr. Berthelot was described by Officer Hill as being almost incoherent; Berthelot's clothing was disheveled and his behavior was described as unusual and erratic and "he seemed to be confused" (R.145a). Game Protector Rankin testified that he was acting very strangely (R.183a).

After Mr. Berthelot was treated, Rankin and Hill tried to ascertain where his

hunting equipment and companions were and where the accident had taken place. Mr. Berthelot's responses indicated he did not know where his vehicle was located or where he was staying (R.131a). Hill and Rankin then proceeded with Mr. Berthelot to search for his vehicle and to find where he was staying. The group proceeded to a local motel where Berthelot indicated that he had rented a room. Investigation revealed that Mr. Berthelot had registered at the motel on November 28, 1981 (R.132a). Hill and Rankin then continued to search by driving Berthelot throughout the area. Finally, Berthelot "found" his pick-up truck on Annin Road near the house which was owned by his mother (R.135a).

Officer Hill and Mr. Berthelot proceeded to the front porch of the residence. Francis V. Cherry came out on the porch and Officer Hill began to question Mr.

Cherry. Mr. Cherry stated to the officer that he did not believe that Mr. Berthelot had been in a hunting accident (R.137a), but stated Berthelot was on a three day drunk of some sort (R.209a). Petitioner Berthelot then advised Hill that he had been in a fight with another individual; Officer Hill then arrested Berthelot for making a false report (R.138a).

After observing broken windows upstairs, and what was believed to be blood on the curtains, Officer Hill proceeded, with Mr. Berthelot in custody, to the local magistrate's office to make an application for a search warrant. Game protector Rankin stayed behind at Hill's request and watched the house (R.191a).

Cherry went inside and stated he was going to take a shower and clean up the house. Later, Rankin observed Cherry walk out of the building with his coat and

hunting rifle. Cherry then told Rankin the house was on fire. Cherry stated that the kitchen curtains had caught on fire while he was heating water to make coffee. It was approximately twelve o'clock noon when the fire started. Rankin immediately called the fire department (R.202a).

The local fire department responded immediately, but the house was completely destroyed by fire. Fire Chief Lawrence Brundage had been called to the scene and had directed the efforts to extinquish the fire. At approximately three o'clock (3:00 P.M.) the fire was put out and only a few walls remained standing (R.217a). Brundage entered the remains to assist in putting out "hot spots" and to determine the cause and origin of the fire. (R.218a).

From the investigation Brundage determined that the fire started in the

east/northeastern portion of the building (R.228a-230a). During his search of the remains Brundage discovered in the southwest portion of the building items which he could not identify. Brundage then seized these items and later turned them over to Trooper McQuay, a member of the Pennsylvania State Police and the Fire Marshal for McKean County (R.223a). The items seized included: glass beakers; glass tubes; heating mantels; and gas masks (R.221a-222a).

After receiving the items, Trooper McQuay, Trooper Charles Lewis and criminalist John Robertson reviewed the items seized by Brundage. On December 4, 1981, a search warrant was obtained from a district justice for the premises based on an application and affidavit (R.122a-123a) that stated in the expert opinion of Robertson and others these seized items were the

type that would and could be used in the manufacture of illegal drugs (R.123a). Later Robertson conducted an analysis of the glass tubes seized by Brundage and found that they contained trace amounts of methamphetamine (N.T. 646, 669).[3]

On December 4, 1981, the search warrant was executed by Lewis, McQuay, Robertson and others. Various items were seized pursuant to this search warrant, including small pieces of aluminum foil, pieces of glass tubes and beakers, pieces of screen copper tubing, a portion of a laboratory catalog, and a bottle of grain alcohol (R.237a-240a).

On May 25, 1982, a federal search warrant was issued authorizing another search of the Annin Road property. (R116a

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[3] References to "N.T." are to portions of the Notes of Testimony of the trial which were not contained in the Record printed below.

et seq.). This search and seizure was conducted on May 26, 1982, by Agents Donald Chase and Steven Sabo of the Drug Enforcement Administration (DEA). Various items were seized during this search, including hot plates, aluminum foil, assorted pieces of glassware, and glass tubing (R.117a). The affidavit in support of this search warrant relied upon information obtained from the November 30, 1981, warrantless seizure of Fire Chief Brundage and the December 4, 1981, search and seizure (R.118a-121a).

Thus, the Government's evidence was offered to show that the house was purchased by Berthelot (even though titled in his Mother's name); that it was destroyed by a fire of suspicious origin, believed to be of an incendiary nature. At the time of the fire it was occupied by Cherry but Berthelot was in police

custody, in an intoxicated condition, in a Trooper's car driving toward a Magistrate where the Trooper intended to apply for a search warrant for the premises. Finally, the evidence was offered to show items found among the ruins of the house constituted paraphernalia used in manufacturing methamphetamine, which contained traces of methamphetamine. The Government thus requested the Judge and jury to conclude from such testimony that Berthelot had conspired with Cherry to manufacture methamphetamine and had done so from the time they purchased the house until it burned down.

However, there was no testimony offered by the Government that any one had ever seen methamphetamine manufactured on the premises or had ever seen Berthelot or Cherry manufacture or possess methamphetamine. The only evidence connect-

ing Petitioner Berthelot with the premises, other than evidence that he had attended settlement and taken title in his mother's name, was that his vehicles were seen parked in front of the premises, which was used as a hunting camp, and that Berthelot was seen by a neighbor working outside the house on six or seven occasions prior to the fire. The neighbor did not say during what period of time any of this occurred.

The only evidence connecting Cherry to the premises was that the same neighbor had seem him outside the premises once or twice prior to the fire (although he never said on what days or during what period of time). He also never testified that he ever saw Cherry in the company of Berthelot or that he saw them in or near the premises at the same time or on the same dates.

NO ONE TESTIFIED THAT THEY EVER SAW BERTHELOT AND CHERRY TOGETHER AT ANY TIME AT THE ANNIN ROAD PROPERTY, NO ONE TESTIFIED THAT THEY EVER SAW THEM TAKE ANY JOINT ACTION, AND NO ONE SAW THEM PARTICIPATE IN ANY JOINT ACTIVITY.

Although neither Defendant testified, both produced witnesses. Petitioner Berthelot called his Aunt to testify that his Mother, Mrs. Olivia Fernandez, had bought this house in the mountains together with him. Mr. Cherry offered, by stipulation, the grand jury testimony of DEA Agent Chase relating to Chase's statement to Game Warden Rankin in which he said that curtains had blown into the fire on the stove and ignited the inside of the residence. He offered the testimony of a volunteer fireman who was also a gasman who turned off the gas on the property before the fire fighters arrived on the scene. Mr. Cherry also offered

the testimony of one neighbor to contradict the testimony of another neighbor who had testified on behalf of the Government that he had observed that the first floor windows were boarded up.

Another witness testified that he knew Cherry to be a deer hunter who hunted in Potter and McKean Counties and that he had asked someone to give Cherry a ride back to Philadelphia the night of the fire. A Mrs. Whitman testified that Mr. Cherry was an avid hunter who saw him before the fire; she stopped at the hunting lodge Friday before the fire but did not see any beakers, flasks or laboratory equipment, nor did she smell any ammonia or other unusual odor. She also said that Cherry did not go hunting with her on the first day of the season, November 30, because he told her Berthelot was very drunk and acting weird. Another

neighbor testified that he was hunting nearby, and that he observed smoke coming from the house, and saw flames coming from a different location of the house than testified by Government witnesses. Investigator Kolins identified photographs of the premises taken by him.

The jury apparently believed that there was no evidence connecting Cherry and Berthelot to the manufacture of methamphetamine, since they found both defendants not guilty on the second count of the indictment charging them with manufacturing that substance. However, they did find both of them guilty of conspiracy. Timely post-verdict motions were argued and denied, and as already noted, both defendants were sentenced separately to the maximum sentence permissible under the statute, even though Petitioner had no prior criminal record.

Appeals were timely filed and briefed jointly by Order of the Court of Appeals. The Court of Appeals denied oral argument and listed the case for disposition on the briefs. The Third Circuit then affirmed the convictions citing this Court's decision in Michigan v. Clifford, 52 U.S.L.W. 4045 (Jan. 10, 1984). The Clifford decision had been announced after the Petitioner Berthelot and Mr. Cherry had filed their joint brief and reply brief but shortly before the date scheduled for disposition of the case by the Court of Appeals. A timely petition for rehearing seeking leave to argue the applicability of the Clifford case was denied.

REASONS WHY THE WRIT SHOULD BE GRANTED

(1) The Third Circuit Court of Appeals by affirming the District Court's decision to admit the items seized by the firemen from the debris, after the fire had been extinghished, has given an overly broad interpretation to the prior decisions of this Court in Michigan v. Tyler, 436 U.S. 499 (1978) and Michigan v. Clifford, 52 U.S.L.W. 4056 (Jan. 11, 1984). The Court of Appeals decision serves to permit the warrantless seizure of items from a fire damaged home which are not related to the cause or origin of the fire, nor readily apparent as contraband or evidence of a crime. In effect, the Court of Appeals has removed the protection guaranteed by the Fourth Amendment from a fire scene. This Court should review whether the seizure here constitutes a permissable extension of Tyler and Clifford.

(2) At the time Petitioner was sentenced, defense counsel objected to an unverifiable opinion from a Government agent in the presentence report which related to the alleged large capability of the alleged drug laboratory. The sentencing judge imposed the maximum sentence on Petitioner, a first offender; the Third Circuit Court of Appeals affirmed stating that it was not persuaded that this misinformation was a factor in the sentence. There is a widening split of authority between the Circuit Courts of Appeal on whether actual reliance on the misinformation must be shown on the part of the sentencing judge to show a due process violation (First, Third and Ninth Circuits), or if the possibility of prejudice is sufficient (Second, Fifth and District of Columbia). This Court should grant this Writ to resolve this conflict.

(3) The Third Circuit Court of Appeals

by affirming Petitioner's conspiracy conviction holding that Petitioner's nexus to a property was sufficient to establish participation in a conspiracy with only one other individual is in direct conflict with the decisions of the Courts of Appeal for the Second, Fifth, Eighth, and Ninth Circuits. These Courts of Appeal have held that mere presence or association is insufficient to establish participation in a conspiracy. Additionally, the Third Circuit Court of Appeal's affirmance of the lower court's decision is a departure from the accepted and usual course of judicial proceedings because of the total lack of evidence to support this conspiracy conviction. This Court should review this case to resolve the conflict which exists between the Circuit Courts of Appeal. Alternatively, this case is such as to call for an exercise of this Court's power of supervision.

POINT I

WHERE A HOUSE FIRE HAS BEEN EXTINGUISHED, BUT FIREMEN REMAIN ON THE PREMISES FOR MOP-UP OPERATIONS, IS THE WARRANTLESS SEIZURE OF ITEMS UNRELATED TO THE CAUSE OF THE FIRE VIOLATIVE OF THE FOURTH AMENDMENT PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES WHERE THE FIREMEN HAVE NO REASONABLE BELIEF THAT THE ITEMS ARE CONTRABAND OR EVIDENCE OF A CRIME?

It is well established that a warantless search and seizure is per se unreasonable, and therefore prohibited by the Fourth Amendment, unless the particular case brings it within one of the specifically established exceptions to the rule. Coolidge v. New Hampshire, 403 U.S. 443, 454 (1971); Katz v. United States, 389 U.S. 347, 357 (1967).

The Court held in Michigan v. Tyler, 436 U.S. 499, 509 (1978) that:

> A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry

> reasonable. Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze. And once in a building for this purpose, Firefighters may seize evidence of arson that is in plain view. Coolidge v. New Hampshire, 403 U.S. 433, 465, 466, 91 C.St. 2022, 2037-2038, 29 L.Ed.2d 564. (Emphasis supplied).

Thus, the seizure of evidence of arson which is in plain view would fall within one of the exceptions to the warrant requirement.

In Tyler this Court stated that the rationale behind this exception to the warrant requirement is that fire officials are charged not only with extinguishing fires, but with finding their causes, because prompt determination of the fire's origin may be necessary to prevent its recurrence. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the

cause of a blaze after it has been extinguished. Michigan v. Tyler, supra, 436 U.S. at 510.

However, once the fire has been extinguished, the exigency disappears, and any further search requires a warrant. Last term the Court in Michigan v. Clifford, 52 U.S.L.W. 4056, 4059 (Jan. 11, 1984), reiterated the strong privacy interest which exists in a private residence. In Clifford, this Court refused to extend Tyler to a warrantless and non-consentual search of a fire damaged home conducted by arson investigators after the fire had been extinguished and fire officials and police had left.

At bar, Fire Chief Brundage and other firemen, engaged in mop-up operations after the fire had been extinguished. During this mop-up operation, Mr. Brundage seized various items from

the fire remains which allegedly were evidence of criminal conduct. These items were unrelated to the cause and origin of the fire. Mr. Brundage did not know the identity of these items when he seized them but he thought that they looked out of place.

Brundage admitted during direct examination that he looked for something out of place, and the items he seized were "something I never--I did not know what it was . . ." (R.27a). He admitted he seized the items because he did not know what they were (R.26-47a).

> By Mr. McBrien:
> Q. And it is your testimony, Mr. Brundage, you have never seen these items. They looked out of place to you because you had not seen them before?
> A. Correct.
> Q. I am referring to the glass beakers, the heaters, and the tubes.
> A. That is right.

(R.53a)

From this testimony it is incontrovertible that Brundage did not seize the various items because he knew or because it was readily apparent that the items were evidence of arson or some other crime, or because they were contraband. Rather, these were items that were not readily apparent as anything to Brundage. Brundage testified that the items seized "were just out of place . . ." (N.T. 33). Brundage did say that he thought that these might help in the arson investigation, but he did not have a particular reason for this except that he was curious about the items (R.68a).

The Court of Appeals upheld the seizure of the items under foresaid circumstances stating only:

> The glass beakers, heaters, and tubes discovered by Fire Chief Brundage at the

> scene immediately after the fire had been brought under control were properly admitted into evidence. The items were seized while the fireman was surveying the rubble for the cause of the fire. Under these circumstances, the items could properly be admitted into evidence as relevant to criminal conduct. Michigan v. Clifford, 52 U.S.L.W. 4056(Jan. 10, 1984); Michigan v. Tyler, 436 U.S. 499 (1978). (Appendix A, p.A-1)

By this holding, the Court of Appeals expanded this Court's holding in both Clifford and Tyler beyong their scope to allow an unconstitutional seizure.

In Clifford this Court stated that when it is determined where a fire has originated, the scope of the search is limited to that area. Michigan v. Clifford, supra, 52 U.S.L.W. at 4059. Here, the items seized were found at the opposite end of the house from where the fire originated. Justice Stevens, concurring in the judgment in Clifford stated:

> ". . . We are also unanimous in our opinion that after investigators have determined the cause of the fire and located the place it originated, a search of other portions of the premises may be conducted only pursuant to a warrant, issued upon probable cause that a crime has been committed, and specifically describing the places to be searched and the items to be seized."
> Michigan v. Clifford supra 52 U.S.L.W. at 4060.

It is clear that this Court intended the Clifford case to limit Tyler and to prevent an extensive search under the pretext that the officials are searching to find the cause of the fire and prevent the fire's recurrence. However, the Third Circuit applied Clifford to extend and broaden Tyler to encompass the search and seizure of evidence of criminal conduct, not related to the fire, not even known to be related to criminal conduct, and not even located near the origin of the fire. When Fire

Chief Brundage seized the various items he was doing exactly what this Court stated in Clifford requires a warrant, namely, seeking evidence of criminal activity.

Furthermore, the Court of Appeals misinterpreted and misapplied Tyler to permit an unconstitutional seizure. Clearly, Tyler allows a warrantless entry and search for the cause and origin of the fire. If, the officials inadvertently come across evidence of arson in plain view it may be seized. Similarly, if evidence of the crimes or contraband is discovered while searching for the cause of the fire it may be seized if the seizure satisfies the requirements of Coolidge v. New Hampshire, supra.

Assuming Mr. Brundage was legitimately on the premises and discovered the items inadvertently the inquiry becomes,

was it immediately apparent to Brundage that the items he seized were contraband or evidence of a crime. From his testimony it is clear that Mr. Brundage did not know the identity of the items and seized them only because they looked "out of place". (N.T.33).

It is submitted that there is absolutely no authority to support an "out of place" exception to the warrant requirement. To uphold this seizure would in effect allow police officers to engage in scavenger hunts while conducting searches because later, if the seized item is discovered to be evidence or contraband, it could then be used at trial. Clearly, the seizure by the Fire Chief violated Petitioner's Fourth and Fourteenth Amendment rights because there was no probable cause to seize these items. In fact, Fire Chief Brundage was suspicious about the items only because

he did not know what they were and thought that they looked out of place. This falls far short of even a reasonably articulable suspicion of how these items could aid in the arson investigation; clearly, Tyler and Clifford require this at a minimum. It is respectfully submitted that to uphold this seizure would violate the fundamental legal principles upon which our country was built.

The Court of Appeals by upholding this seizure has expanded the clear holdings of Tyler and Clifford beyond the scope which this Court originally intended. Accordingly, this Court should review this case to determine whether the seizure here constitutes a warranted extension of Tyler and Clifford.

POINT II

WHERE A PRESENTENCE INVESTIGATION REPORT CONTAINS A MATERIAL MISREPRESENTATION IN THE FORM OF AN UNVERIFIABLE OPINION BY A GOVERNMENT AGENT, IS THE IMPOSITION OF THE MAXIMUM PERIOD OF INCARCERATION FOR A FIRST OFFENDER VIOLATIVE OF DUE PROCESS WHEN IT IS POSSIBLE THAT THE SENTENCING COURT RELIED ON THIS MATERIAL MISREPRESENTATION IN IMPOSING SENTENCE?

This Court has repeatedly held that when a sentencing judge bases his sentencing on a material misapprehension of fact the sentencing violates the individual's rights under the due process clause making the sentencing unconstitutional. United States v. Tucker, 404 U.S. 443, 447-49 (1972)(sentencing based upon prior, unconstitutional convictions); Townsend v. Burke, 334 U.S. 736, 740, (1940)(sentence based upon "assumptions concerning [the defendant's] criminal record which were materially untrue"); Roberts v. United

States, 445 U.S. 552, 556 (1980)(citing Townsend and Tucker with approval.) In Townsend this Court wrote:

> [T]his prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.
> Townsend v. Burke, supra, 334 U.S. at 741.

The lower courts have consistently followed this fundamental principle in deciding cases involving a challenge to a sentencing based upon misinformation. United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982); Diaz Torres v. United States, 564 F.2d 617 (1st Cir. 1977); United States v. Robin, 545 F.2d 775 (2d Cir. 1976); United States v. Bass, 535 F.2d 110 (D.C. Cir. 1976); United States v. Weston, 448 F.2d 626 (9th Cir. 1971) cert. denied 404 U.S. 1061

(1972). As the Third Circuit stated in Moore v. United States, 571 F.2d 179, 183 (3rd Cir. 1978):

> The principle adumbrated in Townsend—that a defendant should not be sentenced on the basis of information about him that is materially incorrect—has not been confined to situations in which a defendant can point to undisputed data that serves directly to invalidate some aspect of the presentence report. Rather, courts have extended the Townsend precept to situations in which the information utilized by the sentencing judge was so unreliable or untrustworthy —even if not plainly false —that it would be unfair to proceed with sentencing on the basis of it.

Before the trial court imposed sentence on Petitioner Berthelot, defense counsel brought to the Court's attention the fact that the pre-sentence report contained an opinion given to the probation department by a DEA agent to the effect that the alleged drug operation was capable of

manufacturing from 136,000 to 400,000 dose units every five hours, which would be three (3) to six (6) pounds a week or twenty (20) to twenty-four (24) pounds a month (ADD.1).[4] The inference sought to be drawn from this statement was clear—Petitioner was portrayed as a major drug dealer capable of producing sizeable quantities of drugs.

Defense counsel objected strenuously at the time of sentencing to the inclusion of the information in the pre-sentence report. Counsel was unable to confront this evidence by presenting defense experts to testify as to the alleged laboratory's capability. The opinion by the DEA agent was given without affording the

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[4] Reference to "Add." is to an Addendum for the Information of the Court which contained the Presentence Investigation Report and was submitted to the Court of Appeals on behalf of Mr. Berthelot.

defense the opportunity to cross-examine or inquire into how this opinion was determined. It is submitted that there is and was no factual basis for this opinion nor any reliable means to determine what were the capabilities of the alleged drug laboratory. All of the items seized were broken and recovered from the rubble of the fire. No evidence was ever offered at trial concerning the capability of the alleged laboratory. Significantly, Petitioner was found not guilty of the charge of manufacturing a controlled substance. The laboratory results of the items seized reveals only trace amounts (residue) of a controlled substance. Furthermore, Agent Chase did not testify at the trial and therefore was never examined by either the Government or defense in this critical area. To allow information not presented under oath, not subjected to confrontation, and not supported by

any testimony in the trial record to play any role in the sentencing process constituted a flagrant violation of Petitioner's due process rights.

The Trial Court listened to defense counsel's argument but imposed the maximum period of incarceration to be served by the Petitioner, despite the fact that he had no prior convictions. The Court of Appeals in affirming the Trial Court's decision wrote:

> Defendant Berthelot's final contention is that the sentencing was based on erroneous information. Counsel argued at length that the capacity of the laboratory presented in the pre-sentence report was exaggerated. The trial judge noted that the information was an opinion of a DEA officer and the judge could not remember whether evidence on the point had been introduced at the trial. He also commented that the issues might be valid to raise with the parole board "but I do not believe that they pertain to the sentence of this court which is a matter of discre-

> tion, of course." The defendant has not persuaded us that the DEA opinion was a factor in the sentence. Appendix A , p.A 1.

It is respectfully submitted that Petitioner has shown that the statement in the Presentence Investigation Report taken in its most favorable light was unreliable. Further, there is nothing in the record or Presentence Report which would serve to justify Petitioner receiving the maximum period of incarceration for his first offense other than this statement which claimed Petitioner was a major drug supplier.

The Court of Appeals for the Second Circuit, the Fifth Circuit, and the District of Columbia have all held that a defendant generally need only establish a possibility that the sentencing judge was influenced by misinformation. United

States v. Robin, supra, 545 F.2d at 779 (hearing required when "possibility of reliance on misinformation is shown"); United States v. Bass, supra, 535 F.2d at 110 (relief granted when "significant possibility that information infected [sentencing] decision"); McGee v. United States, 462, F.2d 243, 247 (2d Cir. 1972) (remanding case because reliance "not improbable"); United States v. Battaglia, 478 F.2d 854 (5th Cir. 1972)(resentencing required even where trial judge stated would have imposed same sentence regardless of inaccuracies). At bar the hearsay allegations made by the Government agent were highly damaging, went far beyond what was proved at trial, and were not permitted to be confronted by defense counsel. See, United States v. Robin, supra, 535 F.2d at 120; United States v. Weston.

The Court of Appeals for the Third

Circuit affirming Petitioner's conviction did not follow the aforesaid circuits. Instead, the Third Circuit followed the holding of the Court of Appeals for the First and Ninth Circuits which require that actual reliance on the misinformation by the sentencing court must be shown by a defendant in order to compel relief. Knight v. United States, 611 F.2d 918, 923 (1st Cir. 1979)(implying that actual reliance must be demonstrated); United States v. Stevenson, 573 F.2d 1105, 1107 (9th Cir. 1978)("no indication that the judge materially relied upon speculative or unsupported information in a presentence report").

Consequently, there is a growing split of authority between the Circuit Courts of Appeal concerning what must be demonstrated in order to successfully raise a due process challenge to a sentencing procedure. It is respectfully submitted that it is

imperative for this Court to resolve this conflict between the Circuit Courts of Appeals because the results of the sentencing process involves and clearly involved in this case a significant deprivation of an individual's right to liberty. This Court has repeatedly held that individuals have a due process right not to be sentenced on the basis of incorrect information. It is now necessary for this Court to settle the substantial question of what reliance, if any, by the sentencing Court on misinformation in the presentence investigation report must be established in order to mandate the resentencing of a defendant.

POINT III

WHERE A RESIDUE OF DRUGS AND ALLEGED DRUG PARAPHERNALIA IS FOUND IN THE RUINS OF A PROPERTY DAMAGED BY FIRE, DOES A CONSPIRACY CONVICTION BASED ON PETITIONER'S ALLEGED OWNERSHIP INTEREST OF THE PREMISES AND MERE PRESENCE AT THE PREMISES ON INFREQUENT OCCASIONS PRIOR TO THE FIRE VIOLATE DUE PROCESS?

This Court, in In Re Winship, 397 U.S. 358, 364 (1970) has set forth the constitutional guidelines for sustaining a conviction under the due process clause of the Fourteenth Amendment. It has mandated that a criminal defendant may not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The standard of proof beyond a reasonable doubt, said the Court, "plays a vital role in the American scheme of criminal procedure," because it operates to give "concrete substance to the presumption of innocence, to ensure against

unjust convictions, and to reduce the risk of factual error in a criminal proceeding." Id. at 363. At the same time, the requirement of proof beyond a reasonable doubt is bottomed on a fundamental value determination of our society that "it is far worse to convict an innocent man than to let a guilty man go free." Id. at 372.

This Court has never subsequently strayed from the Winship understanding of the central purposes that a reasonable doubt standard serves. See Jackson v. Virginia, 443 U.S. 307 (1979); Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977). It follows that when the record evidence in a case cannot reasonably support a finding of guilt beyond a reasonable doubt, a conviction cannot constitutionally stand. Jackson v. Virginia, supra, 443 U.S. at 318.

In the case at bar, the Petitioner and his co-defendant were both found guilty of conspiracy, but both were found not guilty of the substantive charge of manufacturing a controlled substance. The jury apparently believed that the Government had not proved beyond a reasonable doubt that the substance involved was methamphetamine or that Petitioner and his co-defendant were connected with it. In United States v. Caro, 569 F.2d 411, 418 (5th Cir. 1978), the Fifth Circuit, referring to a similar jury verdict, stated:

> "There is nothing necessarily consistent, in law or logic with such a result and we do not hold that a conviction for conspiracy and acquittal of the substantive offense may never properly arise from the same facts and trial. We do suggest, however, that such a result should engage our judicial skepticism. A critical analysis of the facts is

> required when such a contrarity of result does appear. Viewing the slippery facts and the speculations necessary to uphold this conviction in this spirit, we find the syrup of proof simply too thin."

The legal requirements for sustaining a conviction in a drug conspiracy have been well stated in United States v. Bland, 643 F.2d 989, 996 (5th Cir. 1981) (Emphasis supplied):

> "For a defendant to be convicted of conspiracy under 21 USC, Section 846, there must be proof beyond a reasonable doubt that a conspiracy existed, that the accused knew of it, and with that knowledge, voluntarily became a part of it. United States v. Navar, 612 F.2d 1156, 1159 (5th Cir. 1980); United States v. Harbin 601 F.2d 773, 781 (5th Cir. 1979). Moreover, conspiracy to commit a particular substantive offense cannot exist without at least that degree of criminal intent necessary for the substantive offense itself. Ingram v. United States, 360 U.S. 672, 678, 79 S.Ct. 1314, 1319, 3 L.Ed 2d 1503 (1959); United States v. Malatesta, [590 F.2d 1379 (5th Cir.

1979)]."

The Third Circuit has spelled out the requirements sufficiency of evidence in conspiracy cases. In United States v. Kates, 508 F.2d 308 (3rd Cir. 1975), the Court reversed a conviction for conspiracy to defraud the United States and an agency thereof in violation of 18 U.S.C. §371, stating:

> Furthermore, a formal agreement need not be established; rather, a defendant's involvement in the conspiracy may be inferred from circumstantial evidence. The Government need not show that the defendant participated in every transaction or even that he knew the identities of his alleged conspirators or the precise role which they played. 508 F.2d, at 310. (footnote omitted).

The Court went on to state:

> It is imperative, however, that we keep in mind the essential nature of what a conspiracy is in general and what this particular conspiracy was proven to be.

> It is well established that the "gist" of a conspiracy is an agreement [footnote omitted]. However slight or circumstantial the evidence may be, it must, in order to be sufficient to warrant affirmance, tend to prove that the appellant entered into some form of agreement, formal or informal, with his alleged co-conspirators. Ibid. (emphasis added).

Further, in United States v. Cooper, 567 F.2d 252 (3rd Cir. 1977), the Court applied these principles and held that a passenger in a rental truck containing contraband in its rear compartment could not be found guilty of conspiracy with the driver and a third person, despite evidence that he rode in the truck and shared a motel room with the driver.

In the case at bar, the Third Circuit found a "nexus" between the Petitioner and the crime from the mere fact that he admitted to being part owner of the premises and he had been seen on the

premises during the time of the alleged conspiracy. The entire finding of the Court was as follows:

> At the trial, evidence was produced linking each defendant to the premises during the time of the alleged conspiracy. Berthelot admitted to being a part owner of the premises and had been seen there on several occasions during the months before the fire. Cherry had also been seen on the premises on several occasions before the fire. Their nexus with the building and the evidence supporting the production and manufacture of the drug on the premises is sufficient to have permitted a reasonable jury to have found them guilty of conspiracy. United States v. United States Gypsum Co., 600 F.2d 414, 416-417 (3d Cir.), cert. denied 444 U.S. 884 (1979), see also United States v. Nolan, 718 F.2d 589 (1983). Appendix A , p. A-1.

The trial evidence showed that Mrs. Olivia Fernandez, Petitioner Berthelot's mother, was the owner of this house. (R.243a). Furthermore, no one testi-

fied that anyone saw the Petitioner and his co-defendant together at any time at the Annin Road property; no one testified that they ever saw them take any joint action, and no one saw them participate in any joint activity, much less illegal activity.

Even if ownership had been established, the owner of the property does not engage in a criminal conspiracy by innocently allowing the property to be used by persons who so far as he knows have no criminal purposes. United States v. Williams, 569 F.2d 823, 826 (5th Cir. 1978). In Williams, the Fifth Circuit overturned a conspiracy conviction against the owner of a tractor-trailer which contained marijuana where the evidence showed he was not operating the truck and no evidence was offered to show he knew the person who was

using it did so with a criminal purpose. The conviction was overturned despite the evidence that two other vehicles registered in the owner's name had been apprehended in the same year, in the same area for transporting marijuana.

At the time of the fire, Petitioner was in police custody and not even at the scene. Consequently, not only does the finding of a conspiracy violate the requirements of Winship, but it conflicts with decisions of other Circuits which have concluded that mere association with someone involved in a criminal enterprise is insufficient to prove participation in a conspiracy. Additionally, these Circuits have also concluded that mere presence at the scene of a crime does not constitute a sufficient nexus to sustain a conspiracy conviction. See: Second Circuit: United States v.

Soto, 716 F.2d 989 (2nd Cir. 1983); United States v. Johnson, 513 F.2d 819 (2nd Cir. 1975);

Fifth Circuit: United States v. Henry, 661 F.2d 894 (5th Cir. 1981); United States v. Fitzharris, 633 F.2d 416 (5th Cir. 1980); United States v. Willis, 639 F.2d 1335 (5th Cir. 1981); United States v. Littrell, 574 F.2d 828 (1978); United States v. Gutierrez, 559 F.2d 1278 (5th Cir. 1977);

Eighth Circuit: United States v. Brown, 584 F.2d 252 (8th Cir. 1978);

Ninth Circuit: United States v. Melchor-Lopez, 627 F.2d 889 (9th Cir. 1980); United States v. Lopez, 625 F.2d 889 (9th Cir., 1980); United States v. Cloughessy, 572 F.2d 190 (9th Cir. 1977); United States v. Peterson, 549 F.2d 654 (9th Cir. 1977).

The Soto case is particularly close on its facts. In that case, a resident

of an apartment used as a narcotics "cutting mill" was convicted of two counts of conspiracy to distribute narcotics. The Second Circuit reversed that conviction, holding that the fact that the defendant was a resident of the apartment, was found sleeping in the bedroom where drugs were cut, and was present during a meeting between a person in charge of the cutting mill and a DEA agent in the bedroom where guns and drug paraphernalia were in plain view, was insufficient to establish her participation in the conspiracy. The Court noted that while the evidence need not exclude every possible hypothesis of innocence, nevertheless, where the crime charged is conspiracy, a conviction cannot be sustained unless the

Government establishes beyond a reasonable doubt that the defendant has the specific intent to violate the substantive statute.

In the case at bar, as in Soto, the Government produced no evidence whatever linking defendant to a conspiracy. On the basis of association alone, the jurors "let their imaginations run rampant".

Accordingly, this Court should review this case to determine whether the Third Circuit has sustained a conviction without proof beyond a reasonable doubt of all the elements necessary for proof of conspiracy, as required by the Fourteenth Amendment, as interpreted by the Court in Winship, and to resolve the conflict between the Third Circuit and the Second, Fifth, Eighth and Ninth Circuits on the question

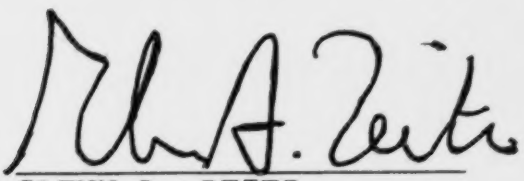
of whether mere presence on the premises upon which are found drugs, drug residues, and drug paraphernalia is sufficient to constitute a conspiracy with the alleged equitable owner of those premises, without any evidence of conspiratorial conduct between the parties.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

5/10/84



GLENN A. ZEITZ
Attorney for Petitioner

GLENN A. ZEITZ, Esquire
RAYMOND W. COBB, Esquire
On the Petitition

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5354 & 83-5404

UNITED STATES OF AMERICA

v.

JOHN M. BERTHELOT,
Appellant in No.83-5354

FRANCIS V. CHERRY,
Appellant in No.83-5404

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 82-95)
District Judge: Hon. Maurice B.Cohill, Jr.

Submitted Under Third Circuit Rule 12(6)
January 26, 1984

Before: HUNTER, WEIS, Circuit Judge and GERRY,*
District Judge

Filed FEB 9 1984

MEMORANDUM OPINION OF THE COURT

APPENDIX A

WEIS, Circuit Judge.

Defendants Berthelot and Cherry were convicted of conspiracy to manufacture methamphetamine in violation of 21 U.S.C. §846. They appeal their convictions alleging insufficient evidence and that evidence introduced was the product of illegal searches. In addition, they allege a denial of due process because they were not permitted to test and analyze residue remaining in materials seized during by (sic) searches. They also contend that the searches were based on materially false information.

The case began when a state police officer encountered Berthelot in a diner, bleeding from the hand, assertedly the result of a hunting accident. The trooper and a district game official accompanied Berthelot to a house in McKean County and

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Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

saw Cherry on the porch. Finding the circumstances suggestive of criminal activity, the police officer went to secure a search warrant for the residence. The game official remained at the scene and was present when the house caught fire. The circumstances were such that the jury could find that Cherry set the fire to destroy evidence of the drug manufacturing enterprise.

After the flames had been extinguished, the local fire chief surveying the debris seized some glass beakers, heaters, and tubes. State police later secured a warrant based on their examination of the items that the fire chief had picked up at the scene. Additional items consistent with drug manufacturing were found and seized. Several months later, the state police once again applied for and received a warrant to search the site of the fire.

APPENDIX A

Again, some materials were seized during the search.

The district court denied defense motions for suppression, finding that the warrants were supported by probable cause, and not tainted by the fire chief's initial seizure on the date of the fire.

Defendants also alleged prosecutorial misconduct that merited suppression of the evidence as to the composition of the residue found and tested. The trial court ruled the evidence admissible and informed defendants that more residue remained that they could test if so desired. Defendants did not test the substances.

At the trial, evidence was produced linking each defendant to the premises during the time of the alleged conspiracy. Berthelot admitted to being a part owner of the premises and had been seen there

on several occasions during the months before the fire. Cherry had also been seen on the premises on several occasions before the fire. Their nexus with the building and the evidence supporting the production and manufacture of the drug on the premises is sufficient to have permitted a reasonable jury to have found them guilty of conspiracy. United States v. United States Gypsum Co., 600 F.2d 414, 416-417 (3d Cir.), cert. denied, 444 U.S. 884 (1979), see also United States v. Nolan, 718 F.2d 589 (1983).

The glass beakers, heaters, and tubes discovered by Fire Chief Brundage at the scene immediately after the fire had been brought under control were properly admitted into evidence. The items were seized while the fireman was surveying the rubble for the cause of the fire. Under these circumstances, the items could

properly be admitted into evidence as relevant to criminal conduct. Michigan v. Clifford, 52 U.S.L.W. 4056 (Jan. 10, 1984); Michigan v. Tyler, 436 U.S. 499 (1978).

Defendants also challenge two later searches conducted by the state police. The first is challeged as lacking probable cause based on evidence independent of materials allegedly seized illegally by the fire chief. Since we have held that these items were lawfully seized, the defendants' challenge has no merit.

Defendants contend the third search, also conducted under a warrant, was based on stale information. The magistrate having before him an affidavit explaining weather conditions and the present description of the premises could reasonably have concluded that further evidence still

remained at the site. Hence, this search was also proper and the evidence properly admissible.

Defendants also assert prosecutorial misconduct in destruction of evidence--the residue consumed in testing and analysis. After a hearing, the trial court found that additional residue was available for testing by the defense, if desired. The mistaken belief that all residue had been consumed was corrected well before trial. We conclude that defendants have not been denied due process.

The trial court prohibited any reference to "arson" during the trial. Defendants assert that this ruling was violated by the government. The trial court's ruling was limited to the use of the term "arson" but permitted testimony about the circumstances surrounding the house fire. Defendants did not object to evidence

about the blaze. The testimony did not use the word "arson," but described possible causes of the fire, including the use of an accelerant. Absent specific mention of the word "arson," the court's ruling had not been violated.

Defendant Berthelot's final contention is that the sentencing was based on erroneous information. Counsel argued at length that the capacity of the laboratory presented in the pre-sentence report was exaggerated. The trial judge noted that the information was an opinion of a DEA officer and that judge could not remember whether evidence on the point had been introduced at the trial. He also commented that the issues might be valid to raise with the parole board "but I do believe that they pertain to the sentence of this court which is a matter of discretion, of course." The defendant has not

persuaded us that the DEA opinion was a factor in the sentence.

After a careful review of the contentions presented on this appeal, we conclude that the defendants have failed to demonstrate error requiring reversal. Accordingly, the judgment and sentence of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/ WEIS
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5354 & 83-5404

UNITED STATES OF AMERICA

v.

JOHN M. BERTHOLET,
Appellant in No.83-5354

FRANK V. CHERRY,
Appellant in No.83-5404

Present: HUNTER and WEIS, Circuit Judges
and GERRY, District Judge*

ORDER CORRECTING CAPTION

It appearing that appellant, John M. Berthelot, notes in his brief that his name is misspelled, it is now

ORDERED that the appellant's name in the above caption shall be changed to read "BERTHELOT."

APPENDIX B

BY THE COURT:

/s/ WEIS

Date: FEB 9 1984

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* The Honorable John F. Gerry, United States District of New Jersey, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5354 & 83-5404

UNITED STATES OF AMERICA

v.

JOHN M. BERTHELOT,
Appellant in No.83-5354

FRANCIS V. CHERRY,
Appellant in No.83-5404

(D.C. Crim. No. 82-095)

Present: HUNTER and WEIS, Circuit Judges
and GERRY,* District Judge.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all

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*Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX C

the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

/s/ WEIS
Circuit Judge

DATED: MAR 12 1984

APPENDIX D

21 U.S.C. §841

§ 841. Prohibited acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute or dispense or possess with intent to dispense, a counterfeit substance.

APPENDIX E

21 U.S.C. §846

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. Pub.L. 91-513, Title II, §406, Oct. 27, 1970, 84 Stat. 1265.

Nos. 83-1840 and 83-1841

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN M. BERTHELOT, PETITIONER

v.

UNITED STATES OF AMERICA

FRANCIS V. CHERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
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JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
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13 pp

QUESTIONS PRESENTED

1. Whether fire officials properly seized drug-manufacturing equipment that they observed in petitioner Berthelot's house after they had extinguished a fire there but while they were still on the premises to check for "hot spots" and to determine the cause of the fire.

2. Whether the evidence was sufficient to support petitioners' convictions.

3. Whether the district court relied on misinformation in sentencing petitioner Berthelot.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1840

JOHN M. BERTHELOT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-1841

FRANCIS V. CHERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5)[1] is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1984. A petition for rehearing was denied on March 12, 1984. The petitions for a writ of certiorari were

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[1]"Pet. App." refers to the Appendix to the Petition in No. 83-1841.

filed on May 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners each were convicted of conspiring to manufacture methamphetamine, in violation of 21 U.S.C. 846, and sentenced to five years' imprisonment. The court of appeals affirmed in a memorandum opinion (Pet. App. A1-A5).

The evidence showed that in July 1981, petitioner Berthelot purchased a residence on Annin Creek Road in McKean County, Pennsylvania (Tr. 560-567, 580). Following the purchase, he covered all the windows on the lower level of the house with boards and installed a fan in the kitchen window (Tr. 582-583). Over the next five months, Berthelot's vehicle was observed in front of the residence on a daily basis, and from time to time Berthelot was seen working outside the house (Tr. 488-499). During that same period, petitioner Cherry also was observed outside the house (Tr. 488-489).

On November 30, 1981, petitioner Berthelot, waving a hammer, ran off the porch of the house in front of a moving vehicle, forcing it to stop. He jumped into the vehicle and put his foot on the gas pedal, all the time screaming at the driver, Norman Henton, that somebody was shooting at his house. As the vehicle proceeded on its way, Berthelot took a rifle from the seat of the car and threatened to shoot a woman who was driving behind Henton and Berthelot, but Henton dissuaded him from doing so. Each time a car passed, Berthelot ducked down for fear he would be shot. Tr. 483-488. When the car reached a local diner, Berthelot had the diner's owner call the police (Tr. 485).

When Trooper William Hill of the Pennsylvania State Police arrived at the diner, he noticed that petitioner Berthelot was acting confused and that his hand was bleeding. Berthelot told Hill that he had been in a hunting accident. Tr. 326-330. Hill called in Game Protector James Rankin, who was charged with investigating hunting accidents, and the two men asked Berthelot what had happened, but Berthelot stated that he did not know (Tr. 331-332).

Officer Hill, Game Protector Rankin, and petitioner Berthelot later went to Berthelot's residence. As they approached the front porch, petitioner Cherry came out of the house. Hill noticed that some of the upstairs windows were broken and that there were bloodstains on the curtains, which were blowing in the wind. Upon being questioned by Hill, Cherry stated that he did not think there had been a hunting accident. Berthelot then changed his story and stated that he had had a fight with somebody named Tom, who had since departed in his own vehicle. Hill placed Berthelot under arrest for giving a false report. Tr. 337-339.

After petitioners denied Officer Hill permission to look around the house, Hill stated that he was going to obtain a search warrant. Hill then left with petitioner Berthelot to place a call to his station house, and petitioner Cherry reentered the house (Tr. 341). A few minutes later, Game Protector Rankin heard a noise coming from the house that sounded like furniture being dragged across the floor (Tr. 414).

When Officer Hill returned from making his call, he once again, in the presence of both petitioners, stated that he was going to obtain a search warrant for the house (Tr. 403). After Hill left, petitioner Cherry reentered the house. A few minutes later, Game Protector Rankin noticed smoke and then flames arising from the house (Tr. 412). Thereafter, Cherry came out of the house carrying a hunting rifle and

informed Rankin that the house was on fire. Cherry did not appear to be upset but merely walked up the road a bit and then stopped. Tr. 415-417.

The local fire department responded to the alarm and extinguished the fire. While checking for "hot spots" and conducting a preliminary investigation into the cause of the fire, Fire Chief Lawrence Brundage observed partially or totally damaged flasks, distilling tubes, transformers, gas masks, and heating units among the debris (Tr. 7-8), as well as a bottle of 190 proof grain alcohol (Tr. 520). Brundage seized these items and turned them over to the fire marshal (Tr. 9, 33-34).

Subsequently, law enforcement officers, acting pursuant to search warrants, seized additional laboratory equipment from the house (Tr. 672-675; C.A. App. 117, 124). The equipment seized was of the type used in the manufacture of methamphetamine (Tr. 697-706) and, indeed, traces of that drug were detected in several flasks and condenser tubes (Tr. 646-647).

ARGUMENT

1. Petitioners contend (83-1840 Pet. 25-34; 83-1841 Pet. 10-14) that Fire Chief Brundage violated their Fourth Amendment rights when he seized the laboratory equipment in the aftermath of the fire. They do not dispute that, once the fire was extinguished, the fire officers were entitled to remain on the premises to check for "hot spots" and to conduct an investigation into the cause of the fire. See *Michigan* v. *Clifford*, No. 82-357 (Jan. 11, 1984), slip op. 5 (plurality opinion); *Michigan* v. *Tyler*, 436 U.S. 499, 509-510 (1978). Nor do petitioners appear to dispute that fire officers may seize evidence of the cause of a fire or of independent criminal activity lawfully observed while on the premises. *Ibid.* Rather, petitioners argue that the seizure of the laboratory equipment was unlawful because Fire

Chief Brundage had no reason to believe that the seized items were connected to the cause of the fire or to any illegal activity.

In our submission, Fire Chief Brundage had ample cause to believe that the laboratory equipment might be relevant in determining the cause of the fire. As a result of his initial investigation, Brundage was unable to determine the cause or origin of the fire. Although he was unaware of the events leading up to the fire, he had been told by other officials that the fire was suspicious. Tr. 21. In short, Brundage could not rule out the possibility of either accident or arson. Given the nature of the items seized — beakers, distilling tubes, heaters, gas masks, 190 proof grain alcohol — it was not unreasonable for Brundage to conclude that the occupants of the house were engaged in some sort of activity — he thought they might be distilling liquor (Tr. 544) — which either caused the fire or provided a motive for the occupants or someone else to set the fire.[2] Accordingly, Brundage acted properly to preserve items that could help illuminate the cause of the fire by removing them from the rubble.[3] See

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[2]Petitioner Berthelot appears to suggest (83-1840 Pet. 30-31) that Brundage had no right to search the dining room, where the laboratory items were observed in plain view, after he determined that the fire had started in another part of the house. To be sure, in *Michigan* v. *Clifford*, slip op. 10, the plurality indicated that once investigators have determined the cause of a fire and located its place of origin, a search of other portions of the premises may be conducted only pursuant to a warrant. But here Brundage had not determined the cause of the fire when he observed the laboratory equipment in the dining room. The fact that the fire started in one part of the house certainly does not mean that evidence of its cause would not be found elsewhere on the premises. Moreover, Brundage had entered the dining room at least in part for the purpose of putting out "hot spots." It cannot seriously be contended that this was improper. See *id.* at 6 n.4.

[3]Indeed, we question whether petitioners could have had a reasonable expectation of privacy in the remains of the premises after the fire. As this Court noted in *Michigan* v. *Clifford*, slip op. 5 (plurality opinion), "[s]ome fires may be so devastating that no reasonable privacy interests

Michigan v. *Tyler*, 436 U.S. at 510 ("[i]mmediate investigation may also be necessary to preserve evidence from intentional or accidental destruction"). His ignorance of the precise purpose to which the laboratory equipment had been put did not render his action any less reasonable under the circumstances.[4]

2. Arguing that the government's proof established at most their presence at a house where methamphetamine was manufactured and petitioner Berthelot's part ownership of the house, petitioners challenge the sufficiency of the evidence supporting their conspiracy convictions (83-1840 Pet. 45-57; 83-1841 Pet. 14-19). Contrary to petitioners' assertions, however, the evidence established significantly more than their mere ownership of or presence on the premises in question.

The evidence against petitioner Berthelot showed that in July 1981 he purchased the house on Annin Creek Road in his mother's name (Tr. 560-567, 579-580, 584) and that he had an ownership interest in the house (Tr. 362); that after

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remain in the ash and ruins, regardless of the owner's subjective expectations." Here, the evidence showed that the fire reduced the premises to rubble (Tr. 671-672), a fact that petitioners themselves acknowledge (83-1840 Pet. 12; 83-1841 Pet. 6).

[4]Brundage's seizure of the laboratory equipment may also be sustained under the inevitable discovery doctrine. See *Nix* v. *Williams*, No. 82-1651 (June 11, 1984). Petitioners do not contend that Brundage would have violated their Fourth Amendment rights had he merely made a list of the items he observed. And while the significance of those items was not immediately apparent to Brundage, the state police officers with whom Brundage was in immediate contact would have known from Brundage's description of the items that they were of the type normally used in an illegal drug operation (Tr. 87-88). Thus, the officers could have applied for and obtained a search warrant based on Brundage's reported observations. In circumstances in which the search that leads to discovery of evidence was lawful, the premature seizure should not provide a basis for suppressing what would in any event ultimately have been seized.

purchasing the house he boarded over all the windows on the lower floor and installed a hooded fan over one of the kitchen windows (Tr. 582-583); that the chemicals used in manufacturing methamphetamine produce strong odors and that one way of dealing with the odors is to blow them out of doors by means of a fan (Tr. 708); that vehicles belonging to Berthelot were observed parked in front of the house on a continuous basis from July through November, 1981 (Tr. 489-490); and that on several occasions during that period Berthelot was observed working outside the house (Tr. 488). This evidence — together with the proof that the laboratory equipment was found in plain view in the kitchen and dining room of the house — was sufficient to implicate Berthelot in a scheme to manufacture methamphetamine.[5]

The evidence against petitioner Cherry likewise was sufficient to implicate him in the scheme. It showed that Cherry had been observed at the house prior to November 30, 1981 (Tr. 488-499); that he was present when Officer Hill stated that he was going to obtain a search warrant for the house (Tr. 340-341); that soon thereafter he was heard dragging something across the floor of the house (Tr. 447); that he was alone in the house when, moments later, the fire started (Tr. 412-413); that when he emerged from the house he was very calm and just stood in the road instead of seeking help (Tr. 454); and that, in the opinion of the fire marshal, the fire had been set (Tr. 756-757). From this evidence, the jury was entitled to conclude that Cherry had set the fire in order to destroy the evidence of methamphetamine manufacturing and therefore that he was a participant in the manufacturing scheme. See *United States* v.

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[5]In addition, Berthelot's strange behavior on the day of his arrest strongly suggests that he had ingested a narcotic; neither Officer Hill, Game Protector Rankin, nor the driver of the vehicle that Berthelot commandeered noticed the odor of alcohol on his breath (Tr. 356, 397, 491).

Mastropieri, 685 F.2d 776, 790-791 (2d Cir.), cert. denied, 459 U.S. 945 (1982); *United States* v. *Castillo,* 615 F.2d 878, 885 (9th Cir. 1980); *United States* v. *Freeman,* 498 F.2d 569, 576 (2d Cir. 1974).

In short, the court of appeals correctly determined that petitioners' challenge to the sufficiency of the evidence lacked merit (Pet. App. A3), and that fact-bound determination does not warrant this Court's review.[6]

3. Petitioner Berthelot's presentence report contained the opinion of the DEA agent who investigated this case that, based on the nature of the equipment found, the methamphetamine laboratory operated by petitioners was capable of producing 136,000 to 400,000 dosage units of methamphetamine every five hours and three to six pounds a week. Arguing that there was no factual basis for this opinion nor any reliable means for determining the capability of the drug laboratory, petitioner Berthelot contends (83-1840 Pet. 35-44) that his right to due process was violated insofar as the district court relied on the agent's opinion in imposing sentence.

In support of his claim, Berthelot cites cases suggesting that a defendant is entitled to relief when there is a significant possibility that the sentencing decision rested on

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[6]In passing, petitioners suggest (83-1840 Pet. 47-48; 83-1841 Pet. 15) that their acquittal on the substantive charge of manufacturing a controlled substance indicates that the evidence was insufficient to support their conspiracy convictions. But there is nothing necessarily inconsistent in convicting a defendant on a conspiracy count while acquitting him on the underlying substantive offense. Here, for example, the jury could have found that although petitioners had entered into an agreement to manufacture methamphetamine, they never actually manufactured the drug or that they did so in a de minimis amount not warranting conviction. In any event, few principles of criminal law are as well established as the rule of *Dunn* v. *United States,* 284 U.S. 390, 393, 394 (1932), that "[c]onsistency in the verdict is not necessary * * *. [V]erdicts cannot be upset by speculation or inquiry into [the reasons for the inconsistency]." See also *Harris* v. *Rivera,* 454 U.S. 339, 345 (1981); *Hamling* v. *United States,* 418 U.S. 87, 101 (1974).

misinformation. See *United States* v. *Robin*, 545 F.2d 775, 779 (2d Cir. 1976); *United States* v. *Bass*, 535 F.2d 110, 118 (D.C. Cir. 1976); *McGee* v. *United States*, 462 F.2d 243, 247 (2d Cir. 1972). Here, the trial judge expressly noted at sentencing that the information concerning the capability of the laboratory was merely an opinion of the DEA agent and that the judge could not remember whether any evidence on the point had been introduced at trial. The trial judge added that while the issue might be worth raising with the parole board or in a legal proceeding relative to the issue of parole, it was not "per[tinent] to the sentence of th[e] court which is a matter of discretion * * *" (C.A. App. 318-319). Even assuming that the agent's opinion was erroneous, it is clear from the judge's statements that that opinion was not a factor in the sentence, and the court of appeals' finding to that effect (Pet. App. A4) does not warrant this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1984

DOJ-1984-07